SWB
April 5, 2000

TABLE OF CONTENTS

DOCKET NO. 21622

COMPLAINT OF AT&T	**§**	
COMMUNICATIONS OF THE	**§**	**PUBLIC UTILITY COMMISSION**
SOUTHWEST, INC., TELEPORT	**§**	
COMMUNICATIONS	**§**	**OF TEXAS**
HOUSTON, INC., AND TCG	**§**	
DALLAS AGAINST	**§**	
SOUTHWESTERN BELL	**§**	
TELEPHONE COMPANY	**§**	
TO ELIMINATE NON-	**§**	
RECURRING CHARGES	**§**	

DOCKET NO. 22290

COMPLAINT OF MCI	**§**	**PUBLIC UTILITY COMMISSION**
WORLDCOM, INC.	**§**	
AGAINST	**§**	**OF TEXAS**
SOUTHWESTERN BELL	**§**	
TELEPHONE COMPANY	**§**	
TO ELIMINATE NON-	**§**	
RECURRING CHARGES	**§**	

SOUTHWESTERN BELL TELEPHONE COMPANY'S
BRIEF ON PHASE I ISSUES

Original + 13

cc: Donna Nelson, Arbitrator, PUC (hand delivered)
Nara Srinivasa, Arbitrator, PUC (hand delivered)
All Parties of Record (hand delivered or via facsimile)

DOCKET NO. 21622

COMPLAINT OF AT&T COMMUNICATIONS OF THE SOUTHWEST, INC., TELEPORT COMMUNICATIONS HOUSTON, INC., AND TCG DALLAS AGAINST SOUTHWESTERN BELL TELEPHONE COMPANY TO ELIMINATE NON-RECURRING CHARGES	§	PUBLIC UTILITY COMMISSION OF TEXAS

DOCKET NO. 22290

COMPLAINT OF MCI WORLDCOM, INC. AGAINST SOUTHWESTERN BELL TELEPHONE COMPANY TO ELIMINATE NON-RECURRING CHARGES	§	PUBLIC UTILITY COMMISSION OF TEXAS

SOUTHWESTERN BELL TELEPHONE COMPANY'S
BRIEF ON PHASE I ISSUES

Now comes Southwestern Bell Telephone Company ("SWBT") and files its brief on the issues in Phase I of this cause.

I.
INTRODUCTION

AT&T Communications of the Southwest, Inc., Teleport Communications Houston, Inc. and TCG Dallas ("AT&T") and MCI WorldCom, Inc. ("MCI-W") have requested that the Public Utility Commission ("Commission") modify their Interconnection Agreements with SWBT to delete or alter certain non-recurring charges ("NRCs") for unbundled network elements ("UNEs"). For the reasons discussed below, Petitioners are not entitled to any pricing modifications with respect to new UNE

combinations they request from SWBT. Depending on the evidence adduced in Phase II of this proceeding, Petitioners may or may not be entitled to some modifications of NRCs when SWBT provides existing combinations of UNEs. Even if Petitioners carry their burden of proof to show that they are entitled to modifications of rates for existing UNE combinations, those modifications can operate prospectively only, except to the extent SWBT agrees to an effective date earlier than the date on which the Commission issues its final order in this docket.

A. When The Texas Public Utility Commission Set The Non-Recurring Charges At Issue, The Governing Law Was That Incumbent Local Exchange Companies Had No Obligation To Combine Unbundled Network Elements For Requesting Carriers.

In December 1997, the Commission established the NRCs that are at issue in this proceeding, including the central office access charge ("COAC") and additional charges for loops, ports and cross-connects. At that time, the governing law with respect to both new and existing combinations of UNEs was contained in the Eighth Circuit's decision.[1] Under that decision, incumbent local exchange companies ("LECs") such as SWBT had no legal obligation to provide assembled combinations to requesting carriers. Consequently, in the Mega-Arbitration, the Commission did not require that TELRIC cost studies be provided to support the rates for (1) assembling new combinations of UNEs, or (2) making available pre-assembled combinations of UNEs. Nor did the parties in the Mega-Arbitration offer evidence that was geared toward meeting a TELRIC cost-based standard for those combining functions.

[1] *See Iowa Utilities Bd. v. Federal Communications Comm'n*, 120 F.3d 753, 813 (8th Cir. 1997) ("While the Act required incumbent LECs to provide elements in a manner that enables the competing carriers to

B. The Subsequent United States Supreme Court Decision Changed The Applicable Law With Respect To Existing Combinations, But Not With Respect To New Combinations.

More than a year after the Commission issued its award in the Mega-Arbitration, the United States Supreme Court reversed the Eighth Circuit's decision with respect to existing combinations. Overturning the Eighth Circuit's vacatur of 47 C.F.R. § 51.315(b), the Supreme Court held that incumbent LECs cannot separate existing combinations of UNEs that are requested by competitive carriers. *See AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721, 737-38 (1999). This reinstatement of 51.315(b) meant not only that an incumbent LEC had to provide requesting carriers with existing combinations of UNEs, but also that it had to do so at cost-based rates. *See* 47 U.S.C. § 252(d); 47 C.F.R. § 51.503, 51.505 (1999).

Notably, the Supreme Court did not disturb the Eighth Circuit's ruling that vacated the FCC rule requiring incumbent LECs to combine <u>new</u> UNEs. Therefore, under current law, different rules apply when a requesting carrier seeks existing UNE combinations and when it requests that the incumbent LEC assemble new UNE combinations: Existing combinations fall within the federal Telecommunications Act of 1996 (the "Act"), and therefore incumbent LECs must make them available at cost-based rates. On the other hand, incumbent LECs are not obligated under the Act to assemble new combinations, and thus there is no obligation to assemble those new combinations at cost-based rates.

---

combine them, unlike the [FCC], we do not believe that this language can be read to levy a duty on the incumbent LECs to do the actual combining of elements.").

C. Recognizing The Change In The Law Governing Existing Combinations, The Fifth Circuit Remanded AT&T's And MCI-W's Judicial Challenges To The NRCs To This Commission For A New Evidentiary Hearing.

Before the Supreme Court issued its decision in *Iowa Utilities Bd.*, AT&T, MCI-W and others challenged the NRCs set by the Texas Commission in the Mega-Arbitration by filing a petition for judicial review pursuant to 47 U.S.C. § 252(e)(6). Applying the principles in the Eighth Circuit decision, the United States District Court for the Western District of Texas upheld the NRCs set by the Commission. AT&T and MCI-W then appealed to the Fifth Circuit Court of Appeals.

Before the Fifth Circuit decided the appeal, the Supreme Court handed down *Iowa Utilities Bd.* Because it was clear in light of *Iowa Utilities Bd.* that the Commission and the district court had evaluated the NRCs for existing combinations under an erroneous legal standard, SWBT requested that the Fifth Circuit remand the cause to the Commission for a new determination based on the correct legal standard. On February 24, 2000, the Fifth Circuit granted SWBT's motion. *See* Order, *Southwestern Bell Telephone Co. v. AT&T Communications of the Southwest, Inc.*, No. 99-50073 (Consolidated) (Feb. 24, 2000).

The parties now have an opportunity for the first time to offer evidence of cost-based rates for the work of providing existing combinations of loops, ports and cross-connects under the standard announced by the Supreme Court in *Iowa Utilities Bd.* It is unnecessary to hold an evidentiary hearing to determine rates for assembling new combinations, however, because the Commission decided that issue correctly during the Mega-Arbitration, and the Supreme Court's decision did not address this issue at

all. Consequently, the Commission should proceed to "Phase II" to take evidence on the proper cost-based rates for providing existing combinations of UNEs only.

II.
DISCUSSION

Response to Issue No. 1:

SWBT is entitled to recover non-recurring charges for providing existing combinations of loops, ports and cross-connects when cost evidence exists to support those charges.

The first issue asks whether SWBT may charge NRCs when loops, ports and cross-connects are ordered as part of an existing combination:[2]

> *In light of AT&T Corp., et al. v. Iowa Utilities Bd., et al., 525 U.S. 366, 119 S. Ct. 721 (1999), and the Federal Communications Commission ("FCC") rules affirmed in that decision, is SWBT entitled to impose on AT&T and MCI-W, in addition to electronic service order charges, the non-recurring charges for loops, ports and cross-connects ordered by the Commission in Docket No. 16266, when AT&T or MCI-W orders existing unbundled network elements ("UNE") combinations to serve a customer?*

The law is clear that SWBT is entitled to impose the NRCs for existing combinations when there is cost evidence supporting the charges.[3]

As discussed above, in *Iowa Utilities Bd.* the Supreme Court held that the FCC acted within its discretion by prohibiting an incumbent LEC from separating already-combined UNEs. *See Iowa Utilities Bd.*, 119 S. Ct. at 737-38 (upholding 47 C.F.R. § 51.315(b)). Thus, when loops, ports and cross-connects are provided as part of the

---

[2] By its terms, this issue applies only to existing combinations. As discussed below in response to issue number 4, evidence of costs is not necessary for new combinations, and SWBT's response to this issue number 1 is not intended to encompass new combinations.

[3] SWBT has agreed as part of the Texas 271 Agreement not to charge the COAC for existing combinations. *See* Section 14 of Attachment UNE-TX for the specific terms.

provision of existing combinations of UNEs, the Commission is obliged by *Iowa Utilities Bd.* and the FCC's rules to set NRCs based on the forward-looking economic cost involved in performing the combining functions.[4] The next step is for the Commission to determine in a Phase II evidentiary hearing what SWBT's forward-looking economic costs are when existing combinations are provided.

Response to Issue No. 2:

The Arbitrators should conduct a Phase II proceeding in accordance with the Fifth Circuit's remand order to receive evidence on SWBT's costs of combining loops, ports and cross-connects in existing combinations.

When AT&T and SWBT first filed the issues in this cause, the appeal by AT&T and MCI-W was still pending before the Fifth Circuit. In light of that pending action, the parties submitted the following issue:

> *Is there adequate cost support as required by the federal Telecommunications Act and the FCC's implementing rules, in the record in Docket No. 16226 to support the current non-recurring charges for loops, ports, and cross-connects imposed when AT&T [or MCI-W][5] orders existing UNE combinations to serve a customer?*

As stated, the Mega-Arbitration did not address cost support for NRCs for existing combinations. Hence that issue should now be addressed in a Phase II evidentiary hearing.

Both the Commission and the Fifth Circuit have recognized the need for the Arbitrators to take additional evidence on SWBT's costs, rather than relying entirely on

---

[4] *See* 47 C.F.R. §§ 51.503, 51.505; *see also In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (First Report and Order) ("Prices for unbundled elements under section 251 must be based on cost under the law, and that should be read as requiring that prices be based on forward-looking economic costs.").

[5] The reference to MCI-W was added after MCI-W intervened in Docket No. 21622.

the cost data used by the Commission to set rates in the Mega-Arbitration. On August 20, 1999, the Commission filed a brief in the Fifth Circuit asking that the appeals court affirm the district court judgment because AT&T had a remedy at the Commission with respect to NRCs. In that brief, the Commission stated that it "must be allowed to review the record, supplement it if needed, and modify the charges as may be warranted."[6] Unquestionably, supplementation of the record is necessary; as noted above, the parties did not offer evidence based upon the now-current standard during the Mega-Arbitration.

Moreover, in its February 24 Order, the Fifth Circuit recognized that the issue was not whether the Mega-Arbitration record contained record support for the NRCs imposed by the Commission. Rather, the court confirmed that the proper inquiry was whether evidence based on the correct legal standard would establish cost support for NRCs: "[T]he ultimate resolution of this case will almost certainly require factual determinations best left to the discretion of the Commission." February 24, 2000 Order at 1.

Because the Commission does not have before it all necessary evidence on which to make the factual determinations necessary to set correct NRCs for existing combinations, the Arbitrators should conduct a Phase II proceeding to take evidence on SWBT's costs of providing those combinations of loops, ports and cross-connects.

---

[6] *See* Brief of Appellees Public Utility Commission of Texas, Pat Wood, III, Judy Walsh and Brett A. Perlman in Response to Briefs of Appellants AT&T and MCI-W, at 17 (Aug. 20, 1999).

Response to Issue No. 3:

The Interconnection Agreement should be modified only if the cost evidence in Phase II demonstrates that SWBT's costs of combining loops, ports and cross-connects in existing combinations are different from the costs set in the Mega-Arbitration.

The third issue states as follows:

> *Should the Interconnection Agreement provisions related to the non-recurring charges be modified to conform to the Commission's decision on Issue Nos. 1 and 2? If so, what should be the effective date of the modification?*

For the reasons discussed above, it is unclear whether modification is necessary with respect to rates for existing combinations; the answer depends on the evidence introduced in the Phase II portion of this proceeding.

Regardless what the evidence may show, it is clear that AT&T and MCI-W have the burden of proof to show not only that the change in the law allows them to seek a modification to the Interconnection Agreements, but also that the modification they seek is appropriate. Thus, before they can avail themselves of modified rates, AT&T and MCI-W must establish that SWBT's costs of providing the relevant UNEs in existing combinations are different from the costs set in the Mega-Arbitration. On the other hand, if the cost evidence presented in Phase II demonstrates that the NRCs set in the Mega-Arbitration for existing combinations accurately reflect associated costs, AT&T and MCI-W will have failed to satisfy their burden of proof, and the NRCs set in the Interconnection Agreements should not be changed.

The third issue also asks what the effective date of any modifications should be. Because the Interconnection Agreements provide a procedure by which to seek modification, the effective date of any such modifications would be when the parties

have completed the steps set forth in the Agreements to establish an effective amendment.

In connection with intervening law changes, the SWBT-AT&T Agreement provides as follows:

> *If the actions of Texas or federal legislative bodies, courts or regulatory agencies of competent jurisdiction invalidate, modify or stay the enforcement of laws or regulations that were the basis for a provision of the contract required by the Arbitration Award approved by the PUC, the affected provision will be invalidated, modified, or stayed as required by action of the legislative body, court or regulatory agency. In such event, the Parties will expend diligent efforts to arrive at an agreement respecting the modifications to the Agreement required. If negotiations fail, disputes between the Parties concerning the interpretation of the actions required or provisions affected by such governmental actions will be resolved pursuant to the dispute resolution process provided for in this Agreement.*

SWBT-AT&T Agreement § 3.0.[7] Under these provisions, AT&T and MCI-W had the burden to negotiate for amendments to their Interconnection Agreements if they believed that the law had changed since those agreements became effective. Because those negotiations were unsuccessful, AT&T invoked the dispute resolution provisions of the Agreements, which allow for formal dispute resolution at the Commission after informal efforts to compromise a controversy have failed. *See* SWBT-AT&T Agreement § 9.5.1. (MCI-W has yet to allege that it has followed the dictates of its agreement). The parties are now engaged in the formal dispute resolution process established by the Commission, and that process will ultimately lead to a final order by the Commission. *See generally* PUC Proc. Rule § 22.326. If Petitioners prevail in that final

order, they will be entitled to relief from the effective date of which will depend on the Petitioners' compliance with their own contract language.

It is noteworthy that the Interconnection Agreements themselves do not specifically provide for a retroactive true-up after the law has changed.[8] Nor do the Commission's post-interconnection dispute rules address retroactive true-ups. Therefore, except to the extent that SWBT has agreed to retroactive true-ups in this or other proceedings, any such change must be prospective. *Cf. Royal Indemnity Co. v. Marshall*, 388 S.W.2d 176, 181 (Tex. 1965) ("Courts cannot make new contracts between the parties, but must enforce the contracts as written.").

In fact, SWBT has agreed that, if any changes to the NRCs for existing combinations are necessary, those changes may be deemed effective as to AT&T on the date on which AT&T filed its complaint in this docket. SWBT has also agreed that any changes necessary for the MCI-W agreement may become effective on March 1, 2000.[9] Thus, any rate changes that may be necessary for existing combinations can be applied retroactively only as to those dates.

---

[7] The MCI-W intervening law provision is virtually identical to the AT&T provision. *See* SWBT- MCI-W Interconnection Agreement § 6.2.

[8] The Interconnection Agreements between SWBT and Petitioners are integrated agreements. The AT&T Agreement, for example expressly provides that it "constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes any prior agreements, representations, statements, negotiations, understandings, proposals or undertakings, oral or written, with respect to the subject matter expressly set forth herein." SWBT-AT&T Agreement § 33.1. The SWBT-MCI-W Agreement has a similar provision. *See* SWBT-MCI-W Agreement § 32. Therefore, Petitioners cannot rely on extra-contractual language or negotiations to argue that the modifications ought to be made effective retroactively.

[9] *See* Michael C. Auinbauh Reply Affidavit ¶ 42, *In re Application by SBC Communications, Inc., et al. for Provision of In-Region InterLATA Services in Texas*, CC Docket No. 00-4 (FCC filed Feb. 22, 2000).

Response to Issue No. 4:

SWBT is not obligated to assemble UNEs in new combinations for AT&T or MCI-W.

The fourth issue asks whether SWBT is required to assemble new combinations of UNEs at the request of a competitive LEC:

> *In light of AT&T v. Iowa Utilities Bd. and the FCC's rules affirmed in that decision, is SWBT obligated to combine UNEs in new combinations as ordered by AT&T or MCI-W?*

Under the Eighth Circuit's decision in *Iowa Utilities Bd.*, which was not modified by the Supreme Court in this respect, SWBT has no such obligation.

The FCC originally concluded that incumbent LECs do have a duty to provide requesting carriers with new combinations of UNEs. 47 U.S.C. § 51.315(c) -(f). As discussed above, however, the Eighth Circuit struck down those parts of the FCC's rules on the grounds that the Act requires requesting carriers, rather than the incumbent LEC, to combine the network elements. *See Iowa Utilities Bd.*, 120 F.3d at 813 ("Despite the Commission's arguments, the plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements themselves; the Act does not require the incumbent LECs to do all the work." (emphasis in original)). Because neither AT&T nor the FCC sought review of the Eighth Circuit's vacatur of 51.315(c)-(f), the Supreme Court did not address that part of the rule; instead, the Court addressed only 51.315(b). *See Iowa Utilities Bd.*, 119 S. Ct. at 737-38. Therefore, the Eighth Circuit's ruling with respect to 51.315(c)-(f) remains in effect, and incumbent LECs have no duty to combine UNEs for requesting carriers.

In fact, the FCC itself has recognized in light of *Iowa Utilities Bd.* that there is currently no requirement that incumbent LECs provide new combinations under

sections 251 and 252 (i.e., on a TELRIC basis). Consistent with this view, the FCC has asked the Eighth Circuit in the remand proceeding to "reinstate the Commission's network element combination rules" and thereby place a duty on ILECs to assemble previously uncombined network elements. *See* Brief for Respondents at 23, *Iowa Utilities Bd. v. Federal Communications Comm'n*, No. 96-3321, On Petition for Review of Orders of the Federal Communications Commission (8th Cir., filed Aug. 16, 1999). The FCC would not seek to establish such a duty if it believed that the obligation already existed.

Two developments that have occurred since the Supreme Court's decision merit brief discussion. First, in the remand proceeding in the Eighth Circuit, AT&T and other requesting carriers have argued that the Supreme Court's reversal of the Eighth Circuit decision with respect to 51.315(b) somehow taints the Eighth Circuit's vacatur of 51.315(c)-(f). That argument is meritless. The Eighth Circuit's decision to vacate Rule 51.315(c)-(f) was based primarily on the understanding that the FCC could not require an incumbent LEC to provide access and interconnection superior in quality to that which the incumbent provided to itself. Indeed, in a brief filed with the Eighth Circuit in 1997, the FCC urged the court to treat 51.315(b) as completely separate from 51.315(c)-(f):

> The incumbents' briefs had complained that requiring ILECs to make changes to their networks or to combine elements that "are not ordinarily combined in the incumbent's network would forcibly conscript incumbents' personnel . . . into the service of competitors." The Court's response that ILECs cannot be required "to do all of the work" and that requesting carriers must "combine the unbundled elements themselves" was simply a restatement of its conclusion in striking down the related rule requiring ILECs to provide "superior" network elements: "[S]ubsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's existing network – not to a yet unbuilt superior one." Prohibiting an ILEC from ripping apart network elements that already are combined in its "existing network" for the sole purpose of increasing its competitors' costs presents no conflict with this rationale.

Response of Federal Respondents to Petitions for Rehearing 9 (8th Cir., Oct. 1, 1997) (emphasis in original). As the FCC suggests, a rule prohibiting the separation of existing elements is distinctly different from a rule affirmatively requiring access to elements or combinations that are not already provided in the incumbent's network. The Supreme Court's rationale for resurrecting the existing-combinations rule – that incumbents should not be able to "impose wasteful reconnection costs on new entrants" – is simply inapplicable to new-combination rules. Therefore, the Eighth Circuit's decision vacating the new-combination rules is controlling in this proceeding.

Second, despite the Supreme Court's failure to address 51.315(c)-(f) in *Iowa Utilities Bd.*, the Ninth Circuit has adopted the novel view that what the Eighth Circuit held to be contrary to the Act – requiring incumbents to create new combinations – nonetheless can be ordered by a state agency applying the Act. *See US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112 (9th Cir. 1999); *see also MCI Telecommunications Corp. v. U.S. West Communications*, No. 98-35819, 2000 U.S.

App. LEXIS 3139 (Mar. 2, 2000). But the Eighth Circuit's review of the FCC's order was undertaken pursuant to the exclusive jurisdiction provisions of the Hobbs Act. *See* 28 U.S.C. §§ 2341-2351.[10] This process gave the Eighth Circuit, and only the Eighth Circuit, jurisdiction over challenges to and defenses of the FCC's rules. *See* 28 U.S.C. § 2349(a) (granting the court of appeals reviewing an agency order "exclusive jurisdiction to make and enter . . . a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency"); *GTE South, Inc. v. Morrison*, 199 F.3d 733, 743 (4th Cir. 1999) (stating that the Eighth Circuit "is now the sole forum for addressing challenging to the FCC's rules").

Acting pursuant to its exclusive jurisdiction, the Eighth Circuit vacated the "new combinations" rules in question as contrary to the Telecommunications Act. As a matter of federal law, those rules have not been reinstated, and cannot be reinstated, by the Ninth Circuit. Thus, unless the Eighth Circuit determines on remand that the rules in question should be resurrected, the FCC cannot enforce those rules, regardless what the Ninth Circuit says. *Cf. Federal Communications Comm'n v. ITT World Communications, Inc.*, 466 U.S. 463, 468,104 S. Ct. 1936, 1939 (1984) (noting that a party cannot evade the exclusive jurisdiction for review of FCC orders by requesting that another court enjoin the action that results from the agency's order).

[10] The challenges to the FCC's rules were originally brought in virtually every circuit and were then consolidated in the Eighth Circuit for a single, national decision pursuant to 28 U.S.C. § 2112(a)(3). *See Iowa Utilities Bd. v. Federal Communications Comm'n*, 109 F.3d 418, 421 (8th Cir. 1996) ("These cases have been consolidated in this circuit by the September 11, 1996 order of the Judicial Panel on Multidistrict Litigation, Docket No. RTC-31, pursuant to Rule 24 of the *Rules of Procedure of the Judicial Panel on Multidistrict Litigation*.").

Nor is it appropriate to conclude, as the Ninth Circuit did, that while the FCC's new-combination rule might be vacated, state commissions may nevertheless require incumbent LECs to assemble UNE combinations for requesting carriers. The purpose of the Hobbs Act and the consolidation procedure set forth in 28 USC § 2112 is to ensure uniformity on a national basis. *See generally GTE South*, 199 F.3d at 743 ("This consolidation procedure for review of agency orders is in place to avoid confusion and duplication by the courts and to prevent unseemly conflicts that could result should sister circuits take the initiative and issue conflicting decisions."). Yet the Ninth Circuit's approach mistakenly ignores these federal laws by stating that a state commission can interpret a federal statute to require the very action the Eighth Circuit held to be contrary to federal law.

Despite the fact that it has no legal obligation to do so, SWBT may voluntarily assemble new UNE combinations for requesting carriers such as AT&T and MCI-W. But because such combining is not required by the Telecommunications Act, there is no obligation for SWBT to do so at cost-based rates. Consequently, the Commission need not revisit the rates for such activity in this proceeding.

For these reasons, the Eighth Circuit's vacatur of 51.315(c)-(f) controls this proceeding, and the Commission is bound by the Eighth Circuit precedent.

Response to Issue No. 5:

The Interconnection Agreement should not be modified with respect to provision of new combinations of UNEs.

The fifth issue asks,

> *Should the Interconnection Agreement provisions related to the Issue No. 4 be modified to conform to the Commission's decision on Issue No. 4? If so, what should be the effective date of the modifications?*

For the reasons set forth above, incumbent LECs have no obligation to provide new combinations of UNEs. Thus, any combining functions that the incumbents perform are outside the scope of the Act. Accordingly, it is unnecessary to modify the Interconnection Agreement as to the provision of new combinations, including the COAC and the NRCs for loops, ports and cross-connects.

Because no modification to the Interconnection Agreement is necessary with respect to new combinations, the second question in the fifth issue, which concerns the effective date of modifications, need not be reached.[11]

Finally, even assuming (contrary to law and fact) that Petitioners were somehow entitled to receive new UNE combinations at cost-based rates, Petitioners would still carry the burden of proof to show that:

(1) Petitioners are entitled to modifications of the Interconnection Agreements for the new combinations;

(2) the modifications Petitioners seek are proper; and

(3) the effective dates Petitioners propose are authorized by the Agreements and/or by the Commission's rules.

[11] If, contrary to SWBT's position, any modifications are required as to NRCs for new combinations, the effective date would be the dates set forth above in response to Issue No. 3.

III.
CONCLUSION

As a matter of law, AT&T and MCI-W are not entitled to any modifications of the rates when SWBT assembles new combinations of UNEs. The Eighth Circuit vacated the FCC rule requiring SWBT to assemble new combinations, and the United States Supreme Court did not disturb that ruling. Therefore, assembly of new combinations is not required under the federal Act, and there is no requirement that the current rates be reviewed.

When SWBT provides pre-existing combinations of UNEs to requesting carriers, it is required to do so at cost-based rates. But the Commission has never had the opportunity to analyze SWBT's cost data under the now-governing legal standard. Therefore, the Commission should conduct a Phase II proceeding in this docket to receive evidence on SWBT's costs of providing existing combinations of UNEs. If any modification is necessary after the evidentiary hearing, that modification should be prospective only from the dates discussed in this brief.

Respectfully Submitted,

ANN E. MEULEMAN
General Counsel-Austin

Timothy P. Leahy
General Attorney
Bar Card No. 24003748

Robert J. Hearon, Jr.
Bar Card No. 09346000
Ron H. Moss
Bar Card No. 14591025

GRAVES, DOUGHERTY,
HEARON & MOODY

515 Congress Avenue, Suite 2300
Austin, Texas 78767
Tel: (512) 480-5600
Fax: (512) 478-1976

SOUTHWESTERN BELL
TELEPHONE COMPANY
Legal Department
1616 Guadalupe, Room 600
Austin, Texas 78701
Tel: (512) 870-5717
Fax: (512) 870-3420

CERTIFICATE OF SERVICE

I, Timothy P. Leahy, General Attorney, for Southwestern Bell Telephone Company, certify that a copy of this document was served on all parties of record in this proceeding on the 5th day of April, 2000 in the following manner:

By hand delivery, facsimile and/or by U.S. Mail.